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Company  
6  
7

8 IN THE UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON  
10 AT SPOKANE

11 BERKLEY ASSURANCE COMPANY,  
a foreign corporation,

12 Plaintiff,

13 v.  
14

15 INLAND WASHINGTON, LLC, a  
Washington limited liability company;  
and RS CONSTRUCTION &  
16 EXCAVATION, INC., a Washington  
corporation,  
17

18 Defendants.

No.:

COMPLAINT FOR DECLARATORY  
JUDGMENT

**JURY DEMAND**

19 Plaintiff Berkley Assurance Company files this Complaint for Declaratory  
20 Judgment and states as follows:

21 **I. THE PARTIES**

22 1.1 **Plaintiff.** Berkley Assurance Company (“Berkley”) is an Iowa  
23 corporation with its principal place of business in Scottsdale, Arizona.

24 1.2 **Defendant.** Inland Washington, LLC (“Inland Washington”) is a  
25 Washington limited liability company. Upon information and belief, its members  
26

1 are Washington citizens.

2       1.3     **Defendant.** RS Construction & Excavation, Inc. (“RS Construction”)  
3 is a Washington corporation, with its principal place of business in Kent,  
4 Washington.

## 5                     **II. JURISDICTION AND VENUE**

6       2.1     **Jurisdiction.** Because there is complete diversity between the parties  
7 and the amount in controversy exceeds \$75,000, exclusive of interest and costs,  
8 this Court has subject matter jurisdiction over this action under 28 U.S.C. §§  
9 1332(a)(1) and 2201(a).

10       2.2     **Venue.** Inland Washington resides in Spokane, Washington, and,  
11 therefore, under 28 U.S.C. § 1391(b), venue is proper in this Court.

## 12                     **III. FACTS**

13       3.1     Inland Washington is a general contractor that specializes in high-  
14 density residential development and construction.

15       3.2     On or about October 23, 2013, Inland Washington hired RS  
16 Construction to perform earthwork, excavation, grading, and utility services as part  
17 of a project to construct the Copper Trail Apartments in Olympia, Washington (the  
18 “Project”).

19       3.3     On or about March 16, 2014, Berkley issued Policy Number VUMB  
20 0055950 (the “Policy”) to RS Construction. The Policy provided commercial  
21 general liability coverage, subject to its terms, conditions, limitations, and  
22 exclusions. A true and correct copy of the Policy is attached as **Exhibit A**.

23       3.2     Coverage under the Policy incepted on March 16, 2014, and,  
24 originally, the Policy was scheduled to expire on March 16, 2015. But because RS  
25 Construction failed to pay the premiums owed under the Policy, Berkley canceled  
26 the Policy on October 11, 2014.

1           3.3    After Berkley canceled the Policy, RS Construction sought to have  
2 coverage reinstated. In a letter to RS Construction's insurance agent, Brown &  
3 Brown Insurance, dated October 27, 2014, RS Construction requested  
4 reinstatement of coverage and stated that RS Construction was unaware of any new  
5 claims that had been brought against it between October 11 and October 27, 2014.

6           3.4    Based on RS Construction's letter to Brown & Brown, Berkley  
7 reinstated coverage under the Policy, effective October 27, 2014.

8           3.5    Following reinstatement of the Policy, however, RS Construction  
9 again failed to pay its premiums. And, therefore, Berkley sent RS Construction a  
10 letter, dated December 11, 2014, in which Berkley explained that the Policy would  
11 be cancelled, effective the following day—that is, coverage under the Policy  
12 expired on December 12, 2014.

13           3.6    On or about December 13, 2016, Inland Washington's counsel sent a  
14 demand letter to RS Construction and two of its past liability insurers: Berkley and  
15 Navigators Insurance Company. In the letter, Inland Washington alleged that RS  
16 Construction breached the parties' construction contract, and performed negligent  
17 and defective work. Inland Washington demanded payment of \$2,129,147 to settle  
18 its threatened claims against RS Construction. Attached as **Exhibit B** is a true and  
19 correct copy of Inland Washington's demand letter (the "Demand Letter") as it  
20 appears in Berkley's claim file. The documents enclosed with the Demand Letter  
21 are not attached.

22           3.7    RS Construction tendered Inland Washington's demand to Berkley,  
23 and Berkley agreed to defend RS Construction subject to a full reservation of  
24 rights.

25           3.8    On or about January 30, 2018, Inland Washington sued RS  
26 Construction in Spokane County Superior Court, in the matter entitled *Inland*

1 *Washington, LLC v. RS Construction & Excavating, Inc.*, Case No. 18200360-6  
2 (the “Underlying Lawsuit”). Attached as **Exhibit C** is a true and correct copy of  
3 the Complaint in the Underlying Lawsuit (the “Underlying Complaint”).

4       3.9 In the Underlying Complaint, Inland Washington alleges that RS  
5 Construction: continually and repeatedly failed to perform its contractual  
6 obligations; failed to complete the work RS Construction was required to perform  
7 under the parties’ contract; performed work that was of substandard quality,  
8 defective and/or was performed in an un-workmanlike manner; and failed to  
9 exercise reasonable care in the performance of its work. Inland Washington  
10 asserted three causes of action against RS Construction and demanded an award of  
11 damages “in an amount to be proven at the time of trial, but no less than  
12 \$2,129,147, plus prejudgment interest.” Inland Washington also sought to recover  
13 its reasonable attorney fees.

14       3.10 Berkley brings the present action seeking a judicial determination that  
15 it has no obligation under the Policy to defend or indemnify RS Construction in the  
16 Underlying Lawsuit.

#### 17 **IV. CLAIM FOR DECLARATORY JUDGMENT**

18       4.1 Berkley incorporates Paragraphs 1.1 through 3.10 as though fully set  
19 forth herein.

20       4.2 A genuine controversy exists between Berkley, Inland Washington,  
21 and RS Construction concerning the coverage, if any, provided under the Policy.

22       4.3 In the Underlying Complaint, Inland Washington contends that RS  
23 Construction is liable for damages caused by RS Construction’s allegedly  
24 incomplete and substandard work. Further, Inland Washington purportedly  
25 suffered harm caused by RS Construction’s negligent workmanship.

26       4.4 Inland Washington’s claims against RS Construction do not fall

1 within the Policy's insuring agreement, which provides as follows:

- 2           **a.**     We will pay those sums that the insured  
3                   becomes legally obligated to pay as  
4                   damages because of "bodily injury" or  
5                   "property damage" to which this  
6                   insurance applies . . . .

7                               \* \* \*

- 8           **b.**     This insurance applies to "bodily injury"  
9                   and "property damage" only if:

- 10                   **(1)**   The "bodily injury" or "property  
11                   damage" is caused by an  
12                   "occurrence" that takes place in  
13                   the "coverage territory";
- 14                   **(2)**   The "bodily injury" or "property  
15                   damage" occurs during the policy  
16                   period . . . .

17 Thus, unless otherwise excluded, the Policy provides liability coverage for  
18 "property damage," caused by an "occurrence," during the policy period.

19       4.5     Costs allegedly incurred by Inland Washington to complete RS  
20 Construction's unfinished or unsatisfactory work are economic losses and, as such,  
21 they do not constitute "property damage" as that term is defined under the Policy.

22       4.6     The Policy provides commercial general liability ("CGL") insurance.  
23 And, therefore, it is not a performance bond, product-liability insurance, or  
24 malpractice insurance. Accordingly, the pure workmanship defects allegedly  
25 performed by RS Construction do not constitute an "occurrence" as that term is  
26 defined under the Policy.

      4.7     The Policy provides liability coverage only for property damage that  
occurs during the policy period. To the extent Inland Washington contends that

1 RS Construction is liable for property damage that occurred after Berkley  
2 cancelled the Policy, the Policy does not provide coverage.

3 4.8 The Policy also excludes liability coverage for Inland Washington's  
4 claims against RS Construction.

5 4.9 The Policy excludes liability coverage for the insured's "ongoing  
6 operations:"

7 This insurance does not apply to:

8 \* \* \*

9 **j. Damage to Property**

10 "Property damage" to:

11 \* \* \*

12  
13 **(5)** That particular part of real property  
14 on which you or any contractors or  
15 subcontractors working directly or  
16 indirectly on your behalf are  
17 performing operations, if the  
"property damage" arises out of  
those operations; or

18 **(6)** That particular part of any property  
19 that must be restored, repaired, or  
20 replaced because "your work" was  
incorrectly performed on it.

21  
22 Under Washington law, these exclusions bar liability coverage for the costs of  
23 correcting an insured's defective work and consequential damages that flow from  
24 the insured's work. To the extent Inland Washington alleges that RS  
25 Construction's defective work resulted in property damage, the ongoing operations  
26 exclusions bar coverage.

1           4.10 In addition, the Policy excludes liability coverage for damage to RS  
2 Construction's work

3                           **I.       Damage to Your Work**

4                                       "Property damage" to "your work" arising  
5 out of it or any part of it including in the  
6 "products-completed operations  
hazard."

7                                       This exclusion does not apply if the  
8 damaged work or the work out of which  
9 the damage arises was performed on  
your behalf by a subcontractor.

10  
11 Under this exclusion, damage to RS Construction's work arising out of its  
12 operations that occurred after RS Construction completed its operations (which are  
13 included in the "products-completed operations hazard")<sup>1</sup> are not covered, unless  
14 the property damage arose out of a subcontractor's work. In the Underlying  
15 Complaint, Inland Washington does not allege that RS Construction's  
16 subcontractors performed defective work. And, thus, to the extent the alleged  
17 property damage occurred after RS Construction completed its operations, the  
18 Policy excludes coverage.

19           4.11 The Policy also excludes liability coverage for "continuing damages:"

20                           **Continuing Damages**

21                                       This insurance does not apply to "bodily  
22 injury" or "property damage" or "personal and  
23 advertising injury" which began prior to the  
earlier of:

24  
25 <sup>1</sup> The "products-completed operations hazard" is a defined term under the Policy,  
26 which refers to property damage arising out of the insured's work after the insured  
completes or abandons its operations.

1. The inception date of the first policy in a series of uninterrupted renewal policies issued by us; or
2. The inception date of this policy.

The exclusion applies whether or not:

1. The damage or its cause was known to any insured before the inception date of the policy;
2. Repeated or continuous exposure to conditions causing “bodily injury”, “property damage” or “personal and advertising injury” occurred during the policy period or caused additional or progressive “bodily injury”, “property damage” or “personal and advertising injury” during the policy period; or
3. The “occurrence” continues during the policy period of this policy; or
4. The insured’s legal obligation to pay damages was established as of the inception date of this policy.

According to this exclusion, if progressive property damage starts before the Policy incepts, the Policy bars coverage. To the extent Inland Washington alleges that RS Construction’s defective work caused progressive property damage which commenced before the Policy incepted, the Policy excludes coverage.

4.12 Further, the Policy excludes liability coverage for “new residential construction”:

The coverage under this policy does not apply



1 to "bodily injury", "property damage",  
2 "personal and advertising injury" or any injury,  
3 loss or damage arising out of inadequate,  
4 improper, faulty or defective construction  
5 arising out of or resulting from "your work" or  
6 "your product" involving "residential  
7 construction". This exclusion does not apply  
8 to "bodily injury", "property damage",  
9 "personal and advertising injury" or any injury,  
10 loss or damage arising out of or resulting from  
11 "your work" or "your product" when associated  
12 with work performed by you or on your behalf  
13 by a subcontractor in or along "utility  
14 easements".

15 "Residential construction" means all  
16 development, design, building or other  
17 construction, improvements, site selection,  
18 surface or subsurface site preparation, or any  
19 work, products or component parts thereof or  
20 services provided in relation to any of the  
21 foregoing, involving property intended in  
22 whole or in part for residential habitation, or  
23 any common or public areas or facilities  
24 related thereto.

25 "Residential construction" does not include  
26 "non-structural repair work" which is begun  
after the date of initial occupancy provided  
such work is unrelated to or does not  
complete work begun prior to the date of initial  
occupancy.

"Non-structural repair work" means any  
residential construction, except residential  
construction that adds or involves a load  
bearing portion of any structure or involves  
any defect that significantly and adversely  
affects use or utility for residential habitation.

"Utility easements" are strips of land used by

1 utility companies to construct and maintain  
 2 overhead electric, telephone and cable  
 3 television lines and underground electric,  
 4 water, sewer, telephone, and cable television  
 lines.

5 Under this exclusion, the Policy does not provide liability coverage for property  
 6 damage arising out of the insured's defective work involving new residential  
 7 construction. In the Underlying Complaint, Inland Washington alleges that RS  
 8 Construction's liability arises out of work performed to construct a new residential  
 9 apartment complex—the Copper Trails Apartments. The Policy, therefore,  
 10 excludes coverage for Inland Washington's claims.

11 4.13 For these reasons, Inland Washington's claims against RS  
 12 Construction are clearly not covered under the Policy. And, therefore, Berkley  
 13 seeks a judicial declaration that it has no obligation to defend or indemnify RS  
 14 Construction for the claims asserted against it in the Underlying Lawsuit.

#### 15 **V. JURY DEMAND**

16 5.1 Berkley requests a trial by jury.

#### 17 **VI. PRAYER FOR RELIEF**

18 Berkley requests the following relief:

19 6.1 **Declaratory Relief.** That this Court declare and decree that Berkley  
 20 has no obligation to defend or indemnify RS Construction for the claims Inland  
 21 Washington brought against RS Construction in the Underlying Lawsuit.

22 //

23 //

24 //

25 //

26 //

